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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ITS PENNSYLVANIA AFFILIATE, *AMICI CURIAE*

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Interest of *Amici*

The American Civil Liberties Union has been engaged for more than forty years in defending the Bill of Rights. Foremost of those rights is the First Amendment which declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." Notwithstanding that injunction, the petitioner in this case has been convicted under a federal statute (18 U. S. C. §1461) of mailing "obscene" publications, sentenced to five years imprisonment and fined $28,000.

The censor's heavy hand has won judicial sanction in this case. *Amici* believe that the conviction and affirmance below pose such a serious danger to literary freedom in

the United States that it is imperative certiorari be granted so that the entire record will be before the Court for the close scrutiny which is always required where the government asserts the power to declare that a publisher has committed a crime by putting ink to paper.

Statement of Facts

Petitioner was convicted under the federal obscenity statute (18 U. S. C. §1461) of using the mails to distribute the magazine *Eros,* Vol. 1, No. 4, a book entitled *The Housewife's Handbook of Selective Promiscuity,* and a newsletter entitled *Liaison,* Vol. 1, No. 1.

At trial, the government offered no expert witnesses on its case in chief. The petitioner, on its case, offered the testimony of a clinical psychologist, the Chairman of the Fine Arts Department of New York University, the critic Dwight McDonald, a practicing psychiatrist, and a Baptist minister. On rebuttal, over objection, the government offered the testimony of two psychiatrists and its own Baptist minister.

Reasons for Granting the Writ

1. Certiorari should be granted so that in this case, "as in all others involving rights derived from the First Amendment guarantees of free expression, this Court [can make] an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis* v. *Ohio,* —— U. S. ——, 12 L. Ed. 2d 793, 799.

The standard for determining "obscenity" which was enunciated in *Roth* v. *United States,* 354 U. S. 476 and *Manual Enterprises* v. *Day,* 370 U. S. 478, is by the Court's

own admission "not perfect" (*Jocobellis* v. *Ohio*, —— U. S. at ——, 12 L. Ed. 2d at 800); and the line between "obscenity" and expression which is constitutionally protected is admittedly "dim and uncertain" (*Jacobellis* v. *Ohio*, —— U. S. at ——, 12 L. Ed. 2d at 797). Thus, the Court has the responsibility, as long as *Roth* is the constitutional key, to examine the whole record in "obscenity" convictions with the greatest care to insure that freedom of speech and of the press is not sacrificed to the censor, over-zealous or not. Cf. *Bantam Books* v. *Sullivan*, 372 U. S. 58.

2. Furthermore, certiorari should be granted in order to reconsider the *Roth* doctrine. It has been recognized by members of the Court[1] and by commentators[2] that that standard is vague and unworkable. For example, three of the four questions which *amicus* fairly posed in its brief (p. 20) in *Jacobellis, supra*, suggest the enormous if not insurmountable difficulties presented by *Roth*: (1) How are the standards of sex portrayal "in a manner appealing to prurient interest" and "having a tendency to excite lustful thoughts" to be applied in concrete cases; (2) Who is the "average person" whose "prurient interest" or "lustful thoughts" need be aroused before material may be adjudged obscene? What of material designed for a special audience; (3) How is the determination that material is "utterly

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[1] *Roth* v. *United States*, 354 U. S. at 494-495 (Mr. Chief Justice Warren concurring); *Smith* v. *California*, 361 U. S. 147, 157 (Mr. Justice Black concurring); *Roth* v. *United States*, 354 U. S. at 512-514 (Mr. Justice Douglas dissenting); *Roth* v. *United States*, 354 U. S. at 497-498 (Mr. Justice Harlan concurring in part and dissenting in part).

[2] Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960); Kalven, Metaphysics of The Law of Obscenity, Supreme Court Review (Univ. of Chicago Press, 1960). See too brief (pp. 16-41) of the American Civil Liberties Union, *amicus curiae*, in *Jacobellis* v. *Ohio, supra*.

without redeeming social importance" to be made? Is the determination to be made by the application of literary or artistic standards or left to the determination of juries?[3]

The case at bar, given the testimony at trial for the defense by a panoply of psychiatric, religious and literary witnesses, dramatizes the inutility—if not the invalidity—of each element of the *Roth* standard. Full briefing and oral argument will afford the opportunity to reexamine again the shaky foundation upon which this threat to First Amendment freedoms rests.

3. Lastly, certiorari should be granted to allow reconsideration of the question whether *Roth* did not depart from the constitutional standard best designed to give the widest latitude to the precepts of a free society without endangering competing social interests. We refer to the clear and present danger test.

It is *amici's* view that "obscenity," as much as any other form of speech, is entitled to the protection of the First Amendment. Accordingly, the question in each case is whether the words or pictures are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about a substantive evil which the state has a right to prevent. See *Schenck* v. *United States*, 249 U. S. 47; *Whitney* v. *California*, 274 U. S. 357.[4]

There is no demonstrable connection between the evil which obscenity statutes are intended to avoid and the

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[3] The fourth question, which asked which community's "contemporary standards" are to be applied, was, of course, answered in *Jacobellis*.

[4] Even the modification of *Dennis* v. *United States*, 341 U. S. 494, is preferable to *Roth*. See note 5, *infra*.

means chosen to avoid that evil.[5] There is no clear and present danger that the utterances sought to be prohibited will bring about the evil to be avoided. Based on present day evidence, the improbability of the evils resulting from the conduct suppressed is so great that no invasion of free speech is warranted. Furthermore, some of the "evils" alleged are not evils in a society which cherishes and thrives on freedom and liberty. See, e.g., *Kingsley International Pictures* v. *Regents of State of New York,* 360 U. S. 684.

[5] See analysis of sociological studies on this point in Judge Frank's concurring opinion in *U. S.* v. *Roth,* 237 F. 2d 786, 804 (2d Cir. 1956); Lockhart & McClure, *Obscenity and the Courts,* 20 Law and Contemp. Probs. 587, 595 (1955); Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40 (1942); see also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in *U. S.* v. *Roth, supra*); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 387 (1954); and see *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101 (1949).

CONCLUSION

This case is representative of a paradox within our multiple jurisdiction system that underlines its general importance. The same issue of *Eros* on which the conviction below was based, was the subject of grand jury investigation in New York County under Section 1141 of the New York Penal Law, but the grand jury refused to indict. Thus despite the application of a national community standard, a work which was not even indictible in New York City was the basis for conviction in federal court in Philadelphia. This is no isolated example of the capricious nature of obscenity prosecutions (cf. *United States* v. *West Coast News Company,* 228 Fed. Supp. 171 (D. W. D. Mich. 1964)), nor is it intended to be. See 1958 U. S. Code and Congressional News Annotated, pp. 4012-4018).

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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